

**United States Department of Labor
Employees' Compensation Appeals Board**

C.J., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Coppell, TX, Employer**

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**Docket No. 15-1200
Issued: May 9, 2016**

Appearances:

Michael E. Woods, for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge

COLLEEN DUFFY KIKO, Judge

ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On May 5, 2015 appellant, through his representative, filed a timely appeal from a March 9, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUE

The issue is whether appellant met his burden of proof to establish disability for the period April 17, 2005 through April 4, 2014, causally related to his March 6, 2002 employment injuries.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence after OWCP rendered its March 9, 2015 decision. The Board's jurisdiction, however, is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, this additional evidence cannot be considered by the Board. 20 C.F.R. § 501.2(c)(1).

On appeal, appellant's representative contends that OWCP had vacated two prior termination decisions dated March 31 and April 15, 2005 and appellant was, therefore, entitled to continuing compensation benefits during the period claimed.

FACTUAL HISTORY

OWCP accepted that appellant, a 49-year-old part-time flex (PTF) rural carrier, sustained a left hip strain, groin strain, left hip contusion and aggravation of traumatic arthropathy of the pelvis and left hip due to a slip and fall while delivering mail on March 6, 2002. Appellant was placed on the periodic rolls and received appropriate compensation benefits.

On November 6, 2002 OWCP advised appellant that the offered modified rural carrier position was suitable and was provided 30 days to accept the position. By decision dated December 20, 2002, it terminated appellant's compensation benefits, effective December 28, 2002, he had refused suitable work.³

On July 24, 2003 appellant requested reconsideration. By decision dated August 6, 2003, OWCP denied modification of its prior decision. Appellant requested reconsideration for a second time on August 8, 2003. In a decision dated August 29, 2003, OWCP found that the November 6, 2002 job offer was no longer valid because Dr. Michael Taba, a Board-certified orthopedic surgeon and appellant's attending physician, had rescinded the work restrictions. It advised appellant that he was eligible to apply for continuing work-related compensation. By letter dated October 17, 2003, appellant was returned to the periodic rolls effective December 29, 2002.

In a February 9, 2005 letter, OWCP found a nixie clerk position suitable in accordance with work restrictions provided by Dr. Robert Holladay, an impartial medical examiner, in his December 16, 2004 report. It noted that both its second opinion physician, Dr. Robert Chouteau, and its referee physician, Dr. Holladay, concurred that appellant was capable of working eight hours per day with restrictions. The employing establishment confirmed that the position remained available. OWCP afforded appellant 30 days to accept the position or provide his reasons for refusal and advised that an employee who refuses an offer of suitable work without reasonable cause is not entitled to compensation. Appellant did not accept the position.

On March 31, 2005 OWCP terminated appellant's wage-loss compensation benefits and schedule award eligibility, effective April 17, 2004, for refusing an offer of suitable work under 5 U.S.C. § 8106(c)(2). By decision dated April 15, 2005, it modified its prior termination decision to reflect the correct effective date of April 17, 2005.

On June 11, 2007 appellant requested reconsideration and submitted electromyography (EMG) and nerve conduction velocity (NCV) studies dated September 15, 2005 which revealed left S1 radiculopathy. He also submitted an October 11, 2006 report from Dr. Richard Buch, an orthopedic surgeon, who indicated that appellant had a left total hip replacement. On May 12,

³ On January 31, 2003 appellant requested an oral hearing before an OWCP hearing representative. By decision dated March 27, 2003, OWCP found that appellant's request was untimely filed and could be equally well addressed by requesting reconsideration.

2005 Dr. Taba requested approval for appellant's surgery based on his worsening symptoms on clinical examination. In a July 17, 2005 report, he clarified that he had initially taken appellant off work on April 3, 2002 but that on April 4, 2002 he had rescinded. Dr. Taba reiterated that appellant had serious orthopedic problems that were worsening and needed medical attention as soon as possible.

In reports dated June 9, 2005 through June 25, 2007, Dr. Louis Zegarelli, a family practitioner, asserted that appellant stepped out of a truck at work when his right leg slipped forward causing him to fall backwards onto the ground suffering multiple injuries. He diagnosed lumbar radicular syndrome on the left, left S1 radiculopathy/radiculitis, posterior facet syndrome, persistent cervicothoracic dysfunction, and mechanical left shoulder pain of undetermined origin, ruling out internal derangement.

By decision dated July 16, 2007, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to present clear evidence of error.

On April 15, 2014 appellant, through his representative, again requested reconsideration and submitted an electronic funds transfer (EFT) form dated April 15, 2014. He further submitted a January 19, 2007 magnetic resonance imaging (MRI) scan of the lumbar spine, a September 14, 2007 electrodiagnostic examination, an April 8, 2008 electromyography (EMG) and nerve conduction velocity (NCV) studies, a September 25, 2008 MRI scan of the cervical spine, a September 16, 2010 MRI scan of the left shoulder, an October 4, 2010 lumbosacral x-ray, and an October 9, 2012 MRI scan of the lumbar spine which showed an abnormal disc at L5-S1.

Appellant submitted reports and progress notes from Dr. Taba including a December 21, 2007 attending physician's report (Form CA-20) diagnosing lumbar sprain, hip/thigh sprain, and contusion of the hip and opining that appellant was totally disabled for work from March 6, 2002 to present. On March 26, 2008 Dr. Taba asserted that appellant was having "a lot of numbness down his leg, which [was] probably related to his back."

On May 17, 2007 Dr. Aaron Lloyd, a Board-certified anesthesiologist, found that appellant's symptomatology was most consistent with facet syndrome. He opined that the direct strike on the back associated with appellant's fall off the truck on March 6, 2002 "may very well have been the initial causative injury."

In reports dated July 23, 2007 through May 6, 2010, Dr. Zegarelli reiterated his diagnoses and opined that appellant's conditions were causally related to his March 6, 2002 employment injury. On May 28, 2008 Dr. Zegarelli explained that any left-sided pain appellant experienced was "emanating from the lumbar spine region with referral into the left hip/leg area." He asserted that appellant's lumbosacral symptoms continued to persist and caused him to be totally disabled for work from September 3, 2008 to the present.

On February 20, 2008 a nurse practitioner diagnosed lumbar spondylosis, lumbar facet syndrome, and neck pain.

In reports dated April 5, 2010 through January 22, 2013, Dr. Edward Wolski, a physiatrist, diagnosed left hip and thigh sprain, cervical sprain, cervical disc displacement,

thoracic sprain, lumbar sprain, low back pain, sciatica, lumbar disc displacement, pain in left limb, back contusion, left hip contusion, left iliofemoral sprain, traumatic arthropathy of pelvis, right partial thickness rotator cuff tear, and spondylosis without myelopathy. He asserted that appellant slipped in the back of his mail truck and landed on the left hip and low back on a sharp corner where the bed of the truck transitioned into the bumper. Appellant also struck the back of his head on a package. Dr. Wolski reported that appellant had a total hip replacement in 2004 and had been unable to return to work since the date of injury due to severe pain. He opined that appellant continued to have chronic pain and psychological problems related to his work injury and was totally disabled for work.

On May 10, 2010 a licensed marriage and family therapist found that results of a mental health evaluation suggested that appellant was a candidate for a return to work rehabilitation program.

A functional capacity examination (FCE) dated May 10, 2010 demonstrated that appellant was capable of part-time, sedentary to light-duty work with the following restrictions: occasional lifting and carrying up to 15 pounds.

On April 23, 2014 appellant filed a claim for compensation (Form CA-7) for the period February 12, 2005 through April 4, 2014.

In a brief dated June 23, 2014, appellant's representative stated that OWCP had failed to provide copies of its March 31 and April 15, 2005 decisions to appellant's then representative and, therefore, they were not properly issued and should be overturned.⁴

By decision dated August 1, 2014, OWCP vacated its March 31 and April 15, 2005 suitable work termination decisions as they had not been properly issued.

In a telephone call log dated August 20, 2014, appellant's representative requested "a specific date as to when the claimant would be placed on the periodic rolls." OWCP advised him that a decision would be rendered before August 29, 2014.

By decision dated August 22, 2014, OWCP denied appellant's claim for disability for the period February 12, 2005 through April 4, 2014 as the medical evidence was insufficient to support disability due to the March 6, 2002 employment injuries.⁵

On September 19, 2014 appellant, through his representative, requested a review of the written record.

By decision dated March 9, 2015, an OWCP hearing representative affirmed the August 22, 2014 decision with modification of the period claimed. She found that appellant's

⁴ Appellant's representative at the time the original decisions were issued was Glenn Tucker.

⁵ On October 8, 2014 appellant, through his representative, requested authorization for spinal surgery. OWCP referred him to Dr. Marvin Van Hal, an orthopedic surgeon, for a second opinion evaluation. In his December 30, 2014 report, Dr. Van Hal opined that the proposed surgery was not causally related to appellant's accepted conditions.

compensation was terminated, effective April 17, 2005. Therefore, the period of denial of compensation was changed to April 17, 2005 through April 4, 2014.

LEGAL PRECEDENT

Section 8102(a) of FECA⁶ sets forth the basis upon which an employee is eligible for compensation benefits. That section provides: “The United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty....” In general the term “disability” under FECA means “incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury.”⁷ This meaning, for brevity, is expressed as disability for work.⁸ For each period of disability claimed, the employee has the burden of proving that he was disabled for work as a result of the accepted employment injury.⁹ Whether a particular injury caused an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by the preponderance of the reliable probative, and substantial medical evidence.¹⁰

Disability is not synonymous with physical impairment, which may or may not result in an incapacity to earn wages. An employee who has a physical impairment causally related to his federal employment, but who nonetheless has the capacity to earn the wages he was receiving at the time of injury, has no disability as that term is used under FECA and is not entitled to compensation for loss of wage-earning capacity. The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the particular period of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.¹¹

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish his claim for disability for the period April 17, 2005 through April 4, 2014, causally related to his employment injuries. While OWCP accepted that appellant sustained a left hip strain, and contusion, groin strain, and aggravation of traumatic arthropathy of the pelvis and left hip, appellant bears the burden to establish through medical evidence that he was disabled during the claimed time periods and that his disability was causally related to his accepted injuries.¹² The Board finds

⁶ 5 U.S.C. § 8102(a).

⁷ 20 C.F.R. § 10.5(f). *See also William H. Kong*, 53 ECAB 394 (2002); *Donald Johnson*, 44 ECAB 540, 548 (1993); *John W. Normand*, 39 ECAB 1378 (1988); *Gene Collins*, 35 ECAB 544 (1984).

⁸ *See Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

⁹ *See William A. Archer*, 55 ECAB 674 (2004).

¹⁰ *See Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

¹¹ *Id.*

¹² *See supra* notes 9-10. *See also V.P.*, Docket No. 09-337 (issued August 4, 2009).

that appellant has submitted no rationalized medical evidence explaining how the employment injuries materially worsened or aggravated his medical conditions and caused him to be disabled for work for the period April 17, 2005 through April 4, 2014.

In his reports, Dr. Zegarelli diagnosed lumbar radicular syndrome on the left, left S1 radiculopathy/radiculitis, posterior facet syndrome, persistent cervicothoracic dysfunction, and mechanical left shoulder pain of undetermined origin and opined that appellant's conditions were causally related to his March 6, 2002 work injury. On May 28, 2008 Dr. Zegarelli explained that any left-sided pain appellant experienced was "emanating from the lumbar spine region with referral into the left hip/leg area." He asserted that appellant's lumbosacral symptoms continued to persist and caused him to be totally disabled for work from September 3, 2008 to the present. As Dr. Zegarelli failed to offer any probative medical opinion on whether appellant was disabled on the dates at issue due to his accepted left hip and groin conditions, his reports are of diminished probative value.¹³ Further, OWCP has not accepted that appellant experienced employment-related spinal or left shoulder conditions under this claim. As such, appellant has the burden of proof to establish that these conditions are employment related.¹⁴ Thus, the Board finds that the reports from Dr. Zegarelli are insufficient to establish that appellant was disabled for work due to the employment injuries for the period claimed.

In his reports, Dr. Wolski diagnosed left hip and thigh sprain, cervical sprain, cervical disc displacement, thoracic sprain, lumbar sprain, low back pain, sciatica, lumbar disc displacement, pain in left limb, back contusion, left hip contusion, left iliofemoral sprain, traumatic arthropathy of pelvis, right partial thickness rotator cuff tear, and spondylosis without myelopathy. He opined that appellant continued to suffer from chronic pain and psychological problems related to his employment injury and was totally disabled for work. The Board finds that Dr. Wolski failed to provide a probative medical opinion explaining why appellant was disabled on the dates at issue due to his accepted conditions. These reports are insufficient to establish employment-related disability for the claimed period.¹⁵

Dr. Taba submitted a December 21, 2007 attending physician's report (Form CA-20) diagnosing lumbar sprain, hip/thigh sprain, and contusion of hip and opining that appellant was totally disabled for work from March 6, 2002 to present. On March 26, 2008 he asserted that appellant was having "a lot of numbness down his leg, which [was] probably related to his back." As Dr. Taba did not address work-related disability for the particular dates at issue, his reports are of diminished probative value.¹⁶ Thus, the Board finds that the reports from Dr. Taba are insufficient to establish appellant's claim for compensation.

Appellant also submitted reports from Drs. Buch and Lloyd. The Board finds that this medical evidence also failed to provide a probative medical opinion on whether appellant was

¹³ See *Sandra D. Pruitt*, 57 ECAB 126 (2005). See also *V.P.*, *id.*

¹⁴ See *Jaja K. Asaramo*, 55 ECAB 104 (2004).

¹⁵ *Supra* note 13.

¹⁶ See *supra* note 13. See also *V.P.*, *supra* note 12.

disabled on the dates at issue due to his accepted conditions. Therefore, this evidence is insufficient to establish appellant's claim.

Appellant also submitted evidence from a nurse practitioner. This evidence does not constitute competent medical evidence because nurse practitioners are not considered "physicians" as defined under FECA.¹⁷ As such, this evidence is insufficient to meet appellant's burden of proof.

The diagnostic reports of record, including the September 15, 2005 and April 8, 2008 electromyography EMG and NCV studies, October 4, 2010 lumbosacral x-ray, and MRI scans dated January 19, 2007, September 25, 2008, September 16, 2010, and October 9, 2012, are of limited probative medical value as they do not specifically address whether appellant was disabled on the dates at issue.¹⁸

On appeal, appellant's representative contends that OWCP had vacated the prior suitable work termination decisions, dated March 31 and April 15, 2005, and that appellant was, therefore, entitled to be returned to the periodic rolls during the period claimed. The fact that the suitable work termination decisions were vacated for having been issued without proper service does not, by itself, establish work-related disability for the period claimed. Following the reversal of those decisions, the CA-7 claim was outstanding and OWCP properly evaluated the medical evidence to determine appellant's capacity for work. Appellant has not submitted sufficient rationalized medical evidence establishing that he was disabled for the period April 17, 2005 through April 4, 2014 causally related to his accepted employment injuries. Therefore, appellant has not met his burden of proof to establish that he remains disabled due to his accepted employment condition.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish disability for the period April 17, 2005 through April 4, 2014, causally related to his March 6, 2002 employment injuries.

¹⁷ 5 U.S.C. § 8101(2); *Sean O'Connell*, 56 ECAB 195 (2004) (reports by nurse practitioners and physician's assistants are not considered medical evidence as these persons are not considered physicians under FECA). *See also Gloria J. McPherson*, 51 ECAB 441 (2000); *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (a medical issue such as causal relationship can only be resolved through the submission of probative medical evidence from a physician).

¹⁸ *See K.W.*, 59 ECAB 271 (2007); *A.D.*, 58 ECAB 149 (2006); *Linda I. Sprague*, 48 ECAB 386 (1997) (medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

ORDER

IT IS HEREBY ORDERED THAT the March 9, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 9, 2016
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board